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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Tariff Filing Requirements	)	CC Docket No. 93-36
for Nondominant Common Carriers	)	

OPPOSITION TO PETITIONS FOR RECONSIDERATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, respectfully submits these comments in opposition to the petitions for reconsideration filed by Bell Atlantic Corp. ("Bell Atlantic") and by SBC Communications, Inc. ("SBC").[1] Bell Atlantic's petition rests on an erroneous interpretation of Section 211 of the Communications Act of 1934, as amended. SBC, on the other hand, seeks to interject extraneous issues in this proceeding, despite the fact that the Commission has already undertaken to examine, in a separate proceeding, those same issues. There is no need, therefore, for the Commission to modify its September 27, 1995 Order ("Order") in any respect.

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[1] See Report No. 2114, 60 Fed. Reg. 62091 (Dec. 4, 1995). Due to the government shutdown, the FCC's offices were closed on December 19, 1995, the date on which this opposition was due. Pursuant to Section 1.4(j) of the Commission's rules, this opposition is being filed on the first business day thereafter that the FCC's offices are open.

I. BELL ATLANTIC'S PETITION SHOULD BE DENIED BECAUSE THE COMMISSION HAS AUTHORITY TO EXEMPT CARRIER-TO-CARRIER CONTRACTS ENTERED INTO BY NONDOMINANT CARRIERS

In its Petition for Partial Reconsideration, Bell Atlantic claims that the FCC lacks the authority under 47 U.S.C. § 211 to exempt nondominant carriers from filing carrier-to-carrier agreements with the Commission.[2] Bell Atlantic's analysis ignores the plain language of Section 211, which allows the Commission to exempt any carrier from the filing requirement upon a finding that the contracts are of minor importance.

A. The Commission Has Express Authority to Exempt Carriers from Filing Minor Contracts

Section 211(a) of the Communications Act requires carriers to file with the FCC "copies of all contracts, agreements, or arrangements with other carriers."[3] Section 211(b), on the other hand, explicitly grants additional discretionary authority to the Commission in two instances.[4] The first clause of subsection (b) confers upon the Commission the authority to require the filing of contracts other than the carrier-to-carrier agreements described in § 211(a). The second clause of § 211(b) grants the Commission the "authority to exempt any carrier from submitting such minor contracts

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[2] Bell Atlantic Petition at 1, 3.

[3] 47 U.S.C. § 211(a).

[4] "The Commission shall have authority to require the filing of any other contracts of any carrier, and shall also have authority to exempt any carrier from submitting copies of such minor contracts as the Commission may determine." 47 U.S.C. § 211(b).

as the Commission may determine." Thus, Section 211(b) modifies the compulsory language of Section 211(a) by giving the Commission discretionary authority to include certain contracts and to exclude other contracts.

Bell Atlantic incorrectly asserts that the second clause of § 211(b), which grants the Commission authority to waive the filing requirement for minor contracts, modifies only the first clause of § 211(b) and not the preceding subsection, § 211(a). In other words, according to Bell Atlantic, the Commission may exempt carriers only from filing those additional contracts (not covered by Section 211(a)) that the Commission might require to be filed pursuant to the first clause of § 211(b). The Commission has previously rejected this interpretation of § 211(b).[5]

The Commission correctly found that Bell Atlantic's interpretation would render the minor contracts clause superfluous.[6] If this interpretation were correct, "the exemption clause of Section 211(b) [permitting the FCC to exempt "minor" contracts] would not extend the Commission any additional authority beyond what it already has under the first clause of subsection (b), since the Commission could effectuate an exemption simply by not imposing a filing requirement in the first place."[7] The power to exempt some non-carrier contracts is implicit in the discretionary nature of the authority granted in the first clause to choose which additional contracts should be

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[5] See Amendment of Sections 43.51, 43.52, 43.53, 43.54 and 47.74 of the Commission's Rules to Eliminate Certain Reporting Requirements, Report and Order, 1 FCC Rcd 933, ¶¶ 9-10 (1986).

[6] Id. at ¶ 9.

[7] Id.

filed. For example, pursuant to the first clause of Section 211(b), the Commission could determine that all carrier financing agreements, over $100,000 must be filed with the agency. By necessary implication, financing agreements in the amount of $100,000 or less would not be required to be filed.

Clearly, the FCC does not need the "minor" contracts clause to exempt those contracts (below $100,000 in the example) which it did not wish to have filed. The only interpretation of the statute, therefore, that gives meaning to both clauses of § 211(b) is the interpretation that the first clause of § 211(b) authorizes the Commission to require the filing of contracts other than those required by § 211(a), while the second clause authorizes the Commission to exempt the filing of any contract it deems to be minor, even if the filing requirement is derived from § 211(a).[8]

Indeed, the purpose of the minor contracts clause is straightforward. Congress recognized that in some instances it may not serve the public interest to require "every" contract to be filed with the FCC. Therefore, it granted the Commission the authority to limit the compulsory language of Section 211(a), by exempting certain carrier-to-carrier contracts from the filing requirement. The Commission may do so for "any such minor contracts as [it] may determine."[9]

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[8] Id. at ¶ 10.

[9] 47 U.S.C. § 211(b). Furthermore, Bell Atlantic is wrong in its claim that the interpretation of Section 211 is controlled by the Supreme Court's decision in MCI v. AT&T, 114 S. Ct. 2223 (1994) interpreting Section 203 of the Act. In MCI, the Court determined that Section 203's grant of authority to "modify" the end-user tariff requirement could not be stretched to the point where the FCC had exempted carriers

(continued...)

B. The Commission Has the Authority to Conclude that All Contracts of Nondominant Carriers are Minor

Alternatively, Bell Atlantic contends that even if the Commission has the authority to exempt certain carrier-to-carrier contracts, it cannot exempt all contracts entered into by nondominant carriers. This assertion also is incorrect. As noted above, Section 211(b) permits the FCC to exempt "any carrier" from the filing requirement, for "such minor contracts as the Commission may determine."[10] The Commission has the discretion to conclude that carrier-to-carrier contracts entered into by nondominant carriers are "minor."

The term "minor" means "lesser in importance, rank, or stature" or "comparatively unimportant."[11] Viewed in relation to the goals of the Communications Act, carrier-to-carrier contracts between nondominant carriers are lesser in "importance" than contracts entered into by dominant carriers. Nondominant carriers, by definition, lack market power. Accordingly, they are unable to charge end

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[9](...continued)
entirely. Id. at 2232-33. With Section 211, by contrast, Congress granted the FCC the power to "exempt" carriers.

[10] 47 U.S.C. § 211(b).

[11] Webster's II, New Riverside University Dictionary 755 (1988); Webster's Third New International Dictionary 1439 (1981); See, e.g. Black's Law Dictionary 997 (6th ed. 1990). The definitions printed in Webster's Third and Black's Law Dictionary were among these credited by the Supreme Court in MCI. See 114 S. Ct. at 2232.

users unreasonable rates or to engage in unreasonable discrimination among customers.[12] They also are unable to extract unreasonable rates or engage in unreasonable discrimination in their dealings with other carriers. Most nondominant carriers purchase (or sell) excess network capacity from other carriers pursuant to individually negotiated agreements. A buyer of such capacity would be unable to extract an unreasonable price or preference, because the seller always could sell its capacity to some other carrier instead. Similarly, a seller's actions would be constrained by the buyer's ability to purchase its capacity from a different vendor. Accordingly, the carrier-to-carrier contracts entered into by nondominant carriers cannot implicate the reasonableness concern of Section 201 or the discrimination concern of Section 202.[13] As such, these contracts are "lesser in importance, rank or stature" and the Commission may, in its discretion, decide that the filing of them would not serve any useful purpose.

II. SBC'S ATTEMPT TO INTERJECT EXTRANEOUS ISSUES SHOULD BE REJECTED

Unlike Bell Atlantic, SBC does not challenge the merits of reducing the regulations applicable to nondominant carriers. Instead, it seeks to compel the FCC to decide here whether it should also reduce the regulations applicable to dominant carrier

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[12] See Policy and Rules Concerning Rates for Competitive Commission Carrier Services and Facilities Authorization therefore Second Report and Order, 91 FCC 2d 59, ¶ 21 (1982).

[13] See 47 U.S.C. §§201-02.

tariffs.[14] The Commission has broad discretion to choose how and in what order it will address the issues within its jurisdiction. It is not obligated, therefore, to examine its rules for dominant carriers here.

Essentially, SBC would prefer that the Commission issue a single order establishing all of its tariff filing requirements for all carriers. Neither the Administrative Procedure Act nor the Communications Act limits the FCC's authority in this way. Indeed, it is clear that "an agency is entitled to the highest deference [from a reviewing court] in deciding priorities among issues, including the sequence and grouping in which it tackles them."[15] The Commission has decided to group tariff filing issues in two proceedings, distinguished by whether the carrier has market power or does not have it. SBC offers no valid reason for the Commission to reassess that decision.[16]

Moreover, no prejudice will result from denying SBC's petition. The issues that SBC urges the Commission to address here already are under review in the LEC Price Cap Review proceeding.[17] Thus, SBC will have the opportunity to justify the

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[14] SBC Petition at ii, 8.

[15] Associated Gas Distributors v. FERC, 824 F.2d 981, 1039 (D.C. Cir. 1987).

[16] It is not true, as SBC contends, that the same issues are presented by the filing of dominant carrier tariffs as the Commission addressed in the Order. Even if, as SBC argues, the burdens of tariff filing are the same for all carriers, the public interest benefits are different, due to dominant carriers' ability to exercise market power if left unregulated. The FCC's decision to treat dominant carrier issues in a separate proceeding is reasonable, therefore.

[17] See Price Cap Preference Review for Local Exchange Carriers, Second Further Notice of Proposed Rulemaking, FCC 95-393 (Sept. 20, 1995).

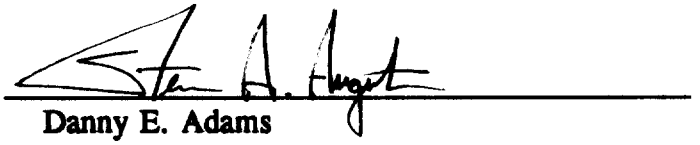
position it advocated in the petition. No purpose would be served by examining those issues here as well. Accordingly, SBC's petition should be denied.

CONCLUSION

For the reasons stated above, the Commission should deny the petitions for reconsideration. The FCC has adequate legal authority to decide whether nondominant carriers must file with the Commission their carrier-to-carrier contracts. The Commission also has the authority to choose the appropriate proceeding in which to examine its regulations of dominant carriers. Therefore, no changes should be made to the Commission's September 27 Order.

Respectfully submitted,

THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

By: 

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